retirement benefit or retirement-type subsidy described in section 411(d)(6)(B)(i), including a QSUPP. Except as provided in paragraph (e)(1)(ii) of this section, different optional forms of benefit exist if a distribution alternative is not payable on substantially the same terms as another distribution alternative. The relevant terms include all terms affecting the value of the optional form, such as the method of benefit calculation and the actuarial assumptions used to determine the amount distributed. Thus, for example, different optional forms of benefit may result from differences in terms relating to the payment schedule, timing, commencement, medium of distribution (e.g., in cash or in kind), election rights, differences in eligibility requirements, or the portion of the benefit to which the distribution alternative applies.

(ii) *Exceptions*—(A) *Differences in benefit formula or accrual method.* A distribution alternative available under a defined benefit plan does not fail to be a single optional form of benefit merely because the benefit formulas, accrual methods, or other factors (including service-computation methods and definitions of compensation) underlying, or the manner in which employees vest in, the accrued benefit that is paid in the form of the distribution alternative are different for different employees to whom the distribution alternative is available. Notwithstanding the foregoing, differences in the normal retirement ages of employees or in the form in which the accrued benefit of employees is payable at normal retirement age under a plan are taken into account in determining whether a distribution alternative constitutes one or more optional forms of benefit.

(B) *Differences in allocation formula.* A distribution alternative available under a defined contribution plan does not fail to be a single optional form of benefit merely because the allocation formula or other factors (including service-computation methods, definitions of compensation, and the manner in which amounts described in §1.401(a)(4)–2(c)(2)(iii) are allocated) underlying, or the manner in which employees vest in, the accrued benefit that is paid in the form of the distribution alternative are different for different employees to whom the distribution alternative is available.

(C) *Distributions subject to section 417(e).* A distribution alternative available under a defined benefit plan does not fail to be a single optional form of benefit merely because, in determining the amount of a distribution, the plan applies a lower interest rate to determine the distribution for employees with a vested accrued benefit having an actuarial present value not in excess of $25,000, as required by section 417(e)(3) and §1.417(e)–1.

(D) *Differences attributable to uniform normal retirement age.* A distribution alternative available under a defined benefit plan does not fail to be a single optional form of benefit, to the extent that the differences are attributable to differences in normal retirement dates among employees, provided that the differences do not prevent the employees from having the same uniform normal retirement age under the definition of uniform normal retirement age in §1.401(a)(4)–12.

(iii) *Examples.* The following examples illustrate the rules in this paragraph (e)(1):

Example 1. Plan A is a defined benefit plan that benefits all employees of Divisions S and T. The plan offers a qualified joint and 50-percent survivor annuity at normal retirement age, calculated by multiplying an employee's single life annuity payment by a factor. For an employee of Division S whose benefit commences at age 65, the plan provides a factor of 0.90, but for a similarly-situated employee of Division T the plan provides a factor of 0.85. The qualified joint and survivor annuity is not available to employees of Divisions S and T on substantially the same terms, and thus it constitutes two separate optional forms of benefit.

Example 2. Plan B is a defined benefit plan that benefits all employees of Divisions U and V. The plan offers a single sum distribution alternative available on the same terms and determined using the same actuarial assumptions, to all employees. However, different benefit formulas apply to employees of each division. Under the exception provided in paragraph (e)(1)(ii)(A) of this section, the single sum optional form of benefit available to employees of Division U is not a separate optional form of benefit from the single sum optional form of benefit available to employees of Division V.

Example 3. Defined benefit Plan C provides an early retirement benefit based on a schedule of early retirement factors that is a single optional form of benefit. Plan C is amended to provide an early retirement window benefit that consists of a temporary change in the plan's benefit formula (e.g., the addition of five years of service to an employee's actual service under the benefit formula) applicable in determining the benefits for certain employees who terminate employment within a limited period of time. Under the exception provided in paragraph (e)(1)(ii)(A) of this section, the early retirement optional form of benefit available to window-eligible employees is not a separate optional form of benefit from the early retirement optional form of benefit available to the other employees.

(2) *Ancillary benefit.* The term ancillary benefit means social security supplements (other than QSUPPs), disability benefits not in excess of a qualified disability benefit described in section 411(a)(9), ancillary life insurance and health insurance benefits, death benefits under a defined contribution plan, preretirement death benefits under a defined benefit plan, shut-down benefits not protected under section 411(d)(6), and other similar benefits. Different ancillary benefits exist if an ancillary benefit is not available on substantially the same terms as another ancillary benefit. Principles similar to those in paragraph (e)(1)(ii) of this section apply in making this determination.

(3) *Other right or feature*—(i) *General rule.* The term other right or feature generally means any right or feature applicable to employees under the plan. Different rights or features exist if a right or feature is not available on substantially the same terms as another right or feature.

(ii) *Exceptions to definition of other right or feature.* Notwithstanding paragraph (e)(3)(i) of this section, a right or feature is not considered an other right or feature if it—

(A) Is an optional form of benefit or an ancillary benefit under the plan;

(B) Is one of the terms that are taken into account in determining whether separate optional forms of benefit or ancillary benefits exist, or that would be taken into account but for paragraph (e)(1)(ii) of this section (e.g., benefit formulas or the manner in which benefits vest); or

(C) Cannot reasonably be expected to be of meaningful value to an employee (e.g., administrative details).

(iii) *Examples.* Other rights and features include, but are not limited to—

(A) Plan loan provisions (other than those relating to a distribution of an employee's accrued benefit upon default under a loan);

(B) The right to direct investments;

(C) The right to a particular form of investment, including, for example, a particular class or type of employer securities (taking into account, in determining whether different forms of investment exist, any differences in conversion, dividend, voting, liquidation preference, or other rights conferred under the security);

(D) The right to make each rate of elective contributions described in §1.401(k)–1(g)(3) (determining the rate based on the plan's definition of the compensation out of which the elective contributions are made (regardless of whether that definition satisfies section 414(s)), but also treating different rates as existing if they are based on definitions of compensation or other requirements or formulas that are not substantially the same);

(E) The right to make after-tax employee contributions to a defined benefit plan that are not allocated to separate accounts;

(F) The right to make each rate of after-tax employee contributions described in §1.401(m)–1(f)(6) (determining the rate based on the plan's definition of the compensation out of which the after-tax employee contributions are made (regardless of whether that definition satisfies section 414(s)), but also treating different rates as existing if they are based on definitions of compensation or other requirements or formulas that are not substantially the same);

(G) The right to each rate of allocation of matching contributions described in §1.401(m)–1(f)(12) (determining the rate using the amount of matching, elective, and after-tax employee contributions determined after any corrections under §§1.401(k)–1(f)(1)(i), 1.401(m)–1(e)(1)(i), and 1.401(m)–2(c), but also treating different rates as existing if they are based on definitions of compensation or other

requirements or formulas that are not substantially the same);

(H) The right to purchase additional retirement or ancillary benefits under the plan; and

(I) The right to make rollover contributions and transfers to and from the plan.

[T.D. 8485, 58 FR 46796, Sept. 3, 1993, as amended by T.D. 8794, 63 FR 70338, Dec. 21, 1998; T.D. 8891, 65 FR 44682, July 19, 2000]

§ 1.401(a)(4)–5 Plan amendments and plan terminations.

(a) *Introduction*—(1) *Overview.* This paragraph (a) provides rules for determining whether the timing of a plan amendment or series of amendments has the effect of discriminating significantly in favor of HCEs or former HCEs. For purposes of this section, a plan amendment includes, for example, the establishment or termination of the plan, and any change in the benefits, rights, or features, benefit formulas, or allocation formulas under the plan. Paragraph (b) of this section sets forth additional requirements that must be satisfied in the case of a plan termination.

(2) *Facts-and-circumstances determination.* Whether the timing of a plan amendment or series of plan amendments has the effect of discriminating significantly in favor of HCEs or former HCEs is determined at the time the plan amendment first becomes effective for purposes of section 401(a), based on all of the relevant facts and circumstances. These include, for example, the relative numbers of current and former HCEs and NHCEs affected by the plan amendment, the relative length of service of current and former HCEs and NHCEs, the length of time the plan or plan provision being amended has been in effect, and the turnover of employees prior to the plan amendment. In addition, the relevant facts and circumstances include the relative accrued benefits of current and former HCEs and NHCEs before and after the plan amendment and any additional benefits provided to current and former HCEs and NHCEs under other plans (including plans of other employers, if relevant). In the case of a plan amendment that provides additional benefits based on an employee's service prior to the amendment, the relevant facts and circumstances also include the benefits that employees and former employees who do not benefit under the amendment would have received had the plan, as amended, been in effect throughout the period on which the additional benefits are based.

(3) *Safe harbor for certain grants of benefits for past periods.* The timing of a plan amendment that credits (or increases benefits attributable to) years of service for a period in the past is deemed not to have the effect of discriminating significantly in favor of HCEs or former HCEs if the period for which the service credit (or benefit increase) is granted does not exceed the five years immediately preceding the year in which the amendment first becomes effective, the service credit (or benefit increase) is granted on a reasonably uniform basis to all employees, benefits attributable to the period are determined by applying the current plan formula, and the service credited is service (including pre-participation or imputed service) with the employer or a previous employer that may be taken into account under §1.401(a)(4)–11(d)(3) (without regard to §1.401(a)(4)–11(d)(3)(i)(B)). However, this safe harbor is not available if the plan amendment granting the service credit (or increasing benefits) is part of a pattern of amendments that has the effect of discriminating significantly in favor of HCEs or former HCEs.

(4) *Examples.* The following examples illustrate the rules in this paragraph (a):

Example 1. Plan A is a defined benefit plan that covered both HCEs and NHCEs for most of its existence. The employer decides to wind up its business. In the process of ceasing operations, but at a time when the plan covers only HCEs, Plan A is amended to increase benefits and thereafter is terminated. The timing of this plan amendment has the effect of discriminating significantly in favor of HCEs.

Example 2. Plan B is a defined benefit plan that provides a social security supplement that is not a QSUPP. After substantially all of the HCEs of the employer have benefited from the supplement, but before a substantial number of NHCEs have become eligible for the supplement, Plan B is amended to reduce significantly the amount of the supplement. The timing of this plan amendment

has the effect of discriminating significantly in favor of HCEs.

Example 3. Plan C is a defined benefit plan that contains an ancillary life insurance benefit available to all employees. The plan is amended to eliminate this benefit at a time when life insurance payments have been made only to beneficiaries of HCEs. Because all employees received the benefit of life insurance coverage before Plan C was amended, the timing of this plan amendment does not have the effect of discriminating significantly in favor of HCEs or former HCEs.

Example 4. Plan D provides for a benefit of one percent of average annual compensation per year of service. Ten years after Plan D is adopted, it is amended to provide a benefit of two percent of average annual compensation per year of service, including years of service prior to the amendment. The amendment is effective only for employees currently employed at the time of the amendment. The ratio of HCEs to former HCEs is significantly higher than the ratio of NHCEs to former NHCEs. In the absence of any additional factors, the timing of this plan amendment has the effect of discriminating significantly in favor of HCEs.

Example 5. The facts are the same as in *Example 4*, except that, in addition, the years of prior service are equivalent between HCEs and NHCEs who are current employees, and the group of current employees with prior service would satisfy the nondiscriminatory classification test of §1.410(b)–4 in the current and all prior plan years for which past service credit is granted. The timing of this plan amendment does not have the effect of discriminating significantly in favor of HCEs or former HCEs.

Example 6. Employer V maintains Plan E, an accumulation plan. In 1994, Employer V amends Plan E to provide that the compensation used to determine an employee's benefit for all preceding plan years shall not be less than the employee's average annual compensation as of the close of the 1994 plan year. The years of service and percentage increases in compensation for HCEs are reasonably comparable to those of NHCEs. In addition, the ratio of HCEs to former HCEs is reasonably comparable to the ratio of NHCEs to former NHCEs. The timing of this plan amendment does not have the effect of discriminating significantly in favor of HCEs or former HCEs.

Example 7. Employer W currently has six nonexcludable employees, two of whom, H1 and H2, are HCEs, and the remaining four of whom, N1 through N4, are NHCEs. The ratio of HCEs to former HCEs is significantly higher than the ratio of NHCEs to former NHCEs. Employer W establishes Plan F, a defined benefit plan providing a benefit of one percent of average annual compensation per year of service, including years of service prior to the establishment of the plan. H1 and H2 each have 15 years of prior service, N1 has nine years of past service, N2 has five years, N3 has three years, and N4 has one year. The timing of this plan establishment has the effect of discriminating significantly in favor of HCEs.

Example 8. Assume the same facts as in *Example 7*, except that N1 through N4 were hired in the current year, and Employer W never employed any NHCEs prior to the current year. Thus, no NHCEs would have received additional benefits had Plan F been in existence during the preceding 15 years. The timing of this plan establishment does not have the effect of discriminating significantly in favor of HCEs or former HCEs.

Example 9. The facts are the same as in *Example 7*, except that Plan F limits the grant of past service credit to five years, and the grant of past service otherwise satisfies the safe harbor in paragraph (a)(3) of this section. The timing of this plan establishment is deemed not to have the effect of discriminating significantly in favor of HCEs or former HCEs.

Example 10. The facts are the same as in *Example 9*, except that, five years after the establishment of Plan F, Employer W amends the plan to provide a benefit equal to two percent of average annual compensation per year of service, taking into account all years of service since the establishment of the plan. The ratio of HCEs to former HCEs who terminated employment during the five-year period since the establishment of the plan is significantly higher than the ratio of NHCEs to former NHCEs who terminated employment during the five-year period since the establishment of the plan. Although the amendment described in this example might separately satisfy the safe harbor in paragraph (a)(3) of this section, the safe harbor is not available with respect to the amendment because, under these facts, the amendment is part of a pattern of amendments that has the effect of discriminating significantly in favor of HCEs.

Example 11. Employer Y maintains Plan G, a defined benefit plan, covering all its employees. In 1995, Employer Y acquires Division S from Employer Z. Some of the employees of Division S had been covered under a defined benefit plan maintained by Employer Z. Soon after the acquisition, Employer Y amends Plan G to cover all employees of Division S and to credit those who were in Division S's defined benefit plan with years of service for years of employment with Employer Z. Because the timing of the plan amendment was determined by the timing of the transaction, the timing of this plan amendment does not have the effect of discriminating significantly in favor of HCEs or former HCEs. See also §1.401(a)(4)–11(d)(3) for other rules regarding the crediting of preparticipation service.